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NOS. 659 AND 660.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

FEDERAL RADIO COMMISSION, JOHNSON-KENNEDY RADIO CORPORATION (Station WJKS), INTERVENER,
Petitioners,

vs.

NELSON BROTHERS BOND & MORTGAGE COMPANY (Station WIBO),
Respondent.

FEDERAL RADIO COMMISSION, JOHNSON-KENNEDY RADIO CORPORATION (Station WJKS), INTERVENER,
Petitioners,

vs.

NORTH SHORE CHURCH (Station WPCC),
Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR JOHNSON-KENNEDY RADIO CORPORATION (Station WJKS), INTERVENER, PETITIONER.

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OPINIONS BELOW.

The Findings and Order of the Federal Radio Commission, appear at R. 1124-1131. The opinion of the Court of Appeals of the District of Columbia (R. 1137-1147) is reported in 62 F. (2d) 854.

JURISDICTION.

The decree of the Court of Appeals was entered December 5, 1932 (R. 1148). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 16 of the Radio Act of 1927, as amended by the Act of July 1, 1930, c. 788, 46 Stat. 844.

COORDINATION OF THIS BRIEF WITH THE GOVERNMENT'S BRIEF.

Petitioner, Johnson-Kennedy Radio Corporation (Station WJKS), incorporates by reference the entire brief of the Solicitor General filed with this Court on behalf of the Federal Radio Commission; and petitioner respectfully asks leave to adopt said brief as its own and join therein as fully as though said brief had been filed by it.

This case raises for the first time before this Court the question of the construction of the Federal Radio Act, with amendments thereto, and regulations promulgated thereunder.

The government's brief deals primarily with the construction of the statutes, particularly the Davis Amendment, and the power thereby conferred upon the Federal Radio Commission to allocate radio facilities. The court below reversed the Commission on the ground that the "facts furnish no legal basis for the decision of the Commission", rendering it "*in a legal sense* arbitrary and capricious." Although we believe that the court below reached that conclusion through a mistaken interpretation of the powers of allocation conferred by the Davis Amendment, still the court flings out the challenge that the record lacks substantial evidence sufficient to make the Commission's findings "conclusive". Consequently the *facts* in the record are discussed and summarized in this brief more fully than would otherwise be done.

QUESTIONS PRESENTED.

WHETHER the Federal Radio Commission has power under the statutes, in the interest of the greater public service, to transfer the facilities of broadcasting stations WIBO and WPCC, in an over-quota State, to station WJKS in an under-quota state, and

WHETHER its findings, under the facts of this record, are supported by substantial evidence and are conclusive, *or*

WHETHER they "clearly appear" to be arbitrary and capricious.

STATUTES AND ORDERS INVOLVED.

The applicable provisions of the Radio Act of 1927 (c. 169, 44 Stat. 1162), as amended by the Act of March 28, 1928, (c. 263, 45 Stat. 373), known as the Davis Amendment, and as further amended by the Act of July 1, 1930 (c. 788, 46 Stat. 844), together with General Orders Nos. 92 and 102 of the Federal Radio Commission, are set forth in the Appendix, *infra*, pp. A-I.

A paragraph from the Act of July 1, 1930, which is the yardstick the reviewing court should use in measuring the correctness of decisions of the Federal Radio Commission, is as follows:

> (d) At the earliest convenient time the court shall hear and determine the appeal *upon the record before it*, and shall have power, *upon such record*, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: Provided, however, That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall *clearly appear* that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States

upon writ of certiorari on petition therefor under section 347 of Title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal. (Italics supplied)

STATEMENT.

The petitioner, Johnson-Kennedy Radio Corporation, operates a part time broadcasting Station, WJKS, at Gary, Indiana, on the frequency of 1360 kc. (R. 1125.)

Indiana is 22 per cent UNDER its quota of radio assignments. (R. 1129.) It is more under-quota than any State in the Fourth Zone. (R. 108-113.)

The respondent, Nelson Brothers Bond & Mortgage Company, operates broadcasting Station WIBO, sharing time with the respondent North Shore Church, which uses call letters WPCC, on the frequency of 560 kc., in Chicago, Illinois. (R. 1128-1129.)

Illinois is 55 per cent OVER its quota of radio assignments. (R. 1129.)

Illinois and Indiana are both in the Fourth Zone, which has more than its prorata share of radio facilities. (R. 1129.)

WJKS suffers from objectionable interference in the form of cross-talk and heterodyne on the 1360 kc. frequency. (R. 1127-1128.) To get rid of the cross-talk, it applied to the Commission for the use of any other frequency in the range between 560 and 610 kc. (R. 35-38.) To extend the community service its station is rendering to the population of the Gary steel mills and Calumet area, it applied to the Commission for full time.

Before petitioner's application had been set for hearing the Commission, on January 8, 1931, promulgated a rule of procedure, known as General Order No. 102 (Appendix, p. H), providing that—

> Applications from under-quota states in zones which have already allocated to them their prorata share of radio facilities should be for a facility already in use in that zone by an over-quota state.
>
> * * * * * * * * *

> All applications now pending before the Commission which have not been heard or designated for hearing by the Commission may be amended by the applicants to conform to this Order.

Accordingly, petitioner amended its pending application to focus its request for the single 560 kc. frequency, which was then in use by Stations WIBO and WPCC, in the over-quota State of Illinois. (R. 39.)

When it came time to renew the licenses of WIBO and WPCC, the Commission specifically restricted them as to time and terms. The stations accepted the restricted licenses, not for the usual three months' period, but "on a temporary basis, and *subject to such action as the Commission may take after hearing on the application filed by WJKS.*" (R. 42.)

Hearing was set for April 23, 1931, and respondents, Stations WIBO and WPCC, together with other interested parties, were duly notified. (R. 43-46.) Testimony was taken before the Chief Examiner of the Commission from April 23 to April 30, 1931. (R. 1125.) The Examiner filed a report recommending that the application be denied (R. 1082-1094), to which report exceptions were taken (R. 1095-1123), which placed the case before the full Commission.

The Commission, on October 16, 1931, disregarding most of its Examiner's report, made its own unanimous "findings" from the record, as follows (R. 1130):

> 1. The applicant station (WJKS) now renders an excellent public service in the Calumet region and the granting of this application would enable that station to further extend and enlarge upon that service.
>
> 2. The deletion of Stations WIBO and WPCC would not deprive the persons within the service area of those stations of any type of programs not now received from other stations.
>
> 3. Objectionable interference is now experienced within the service area of WJKS through the operation of other stations on the same and adjacent frequencies.

4. The granting of this application and deletion of Stations WIBO and WPCC would not increase interference within the good service areas of any other stations.

5. The granting of this application and the deletion of Stations WIBO and WPCC would work a more equitable distribution of broadcasting facilities within the Fourth Zone, in that there would be an increase in the radio broadcasting facilities of Indiana which is now assigned less than its share of such facilities and a decrease in the radio broadcasting facilities of Illinois which is now assigned more than its share of such facilities.

6. Public interest, convenience and/or necessity would be served by the granting of this application

and pursuant to such findings, the Commission entered its order, granting the application of WJKS for modification of station license to permit it to operate full time on the 560 kc. frequency, and directing the discontinuance of respondents' temporary licenses for said frequency, the order to become effective twenty days thereafter. (R. 1130, 1131.)

Upon appeal by the Stations WIBO and WPCC, from the above findings and order, the Court of Appeals of the District of Columbia reversed the order of the Commission as being arbitrary and capricious, Justices Groner and Hitz dissenting.[1] (R. 1142, 1148.) Writs of certiorari granted by this Court bring the cases here.

---

[1] The dissenting opinion of two of the five Justices in the Court below was largely based, not upon the question of the right of that Court to reverse the findings of fact by the Federal Radio Commission because of lack of any reasonable evidence to sustain the Commission's finding, but on the contrary, the dissenting Justices considered the weight of the evidence and concluded, not only that there *had* been sufficient evidence of the facts before the Commission to warrant it in the exercise of its lawful duty to weigh the evidence and determine the issues, but that they themselves would have decided the matter, as did the Commission, in favor of the petitioner. Thus it appears that the effect of the majority opinion is not only to charge all five members of the Commission, but also to charge two of the Appellate Court Judges (Hitz and Groner) with being arbitrary and capricious in the view they take of the evidence in the record!

SUMMARY OF ARGUMENT.

The court has jurisdiction to entertain this proceeding. *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, relied on by the respondents, is not controlling here. That case was just an application for the renewal of an existing license. It was an *ex parte* proceeding, involving no conflicting claims between adverse parties, and the determination of the question by the Commission was purely an administrative act. So was the review by the Court of Appeals.

The instant cases present conflicting claims between adverse parties, their rights thereto arising under a statute. The respective claimants presented witnesses, had the benefit of cross-examination, and the proceeding had all the elements of a judicial trial. Before the Commission it was, therefore, a case or controversy within the meaning of the Constitution. In reviewing this controversy it was necessary for the court below, acting under the authority of the 1930 Act, not only to pass upon the evidence to determine whether it was substantial enough to support the Commission's findings, but to interpret the statute under which the conflicting claims arose. In doing so it discharged a judicial, as distinguished from an administrative function. The record, therefore, presenting a case or controversy and a judicial decision, this Court has jurisdiction under the Constitution and laws to entertain the writs of certiorari issued herein.

On the merits, petitioner submits that the court below not only misconstrued the statute, but that its conclusions are not supported by the record. It erroneously rejected the findings of the Commission and accepted the views of the Examiner whose recommendations had been rejected by the Commission. It failed to follow applicable principles announced in its prior decisions which, if applied to the facts in this case, would have required an affirmance of the Commission's order granting petitioner's application for in-

creased broadcasting facilities to which it was entitled under the statute.

If the court's decision is permitted to stand, it will be impossible in many instances to carry out the mandate of Congress requiring the Federal Radio Commission to make and maintain a fair and equitable allocation of the broadcasting facilities throughout the country.

The decision of the court below should be reversed.

ARGUMENT.

I.

This Court Has Jurisdiction to Entertain this Proceeding.

We are met by the challenge that this Court is without jurisdiction to entertain these cases, because of the dismissal of the writ of certiorari in *Fed. Radio Comm. v. General Electric Co.*, 281 U. S. 464, and the reasons given therefor. That case is not controlling here. In the *General Electric Company* case, as the Court pointed out, there were not two parties; in fact, the case consisted only of an application by the Electric Company for a renewal of its existing license. The Federal Radio Commission refused to renew the existing license, but issued in its stead one having fewer hours of service. The Court of Appeals, acting under the terms of the law prior to 1930, really put itself in the place of the Commission to pass upon the application.

Of course, this Court's decision in the *General Electric Co.* case is controlling as to the issues there involved, but that decision cannot be applied more broadly than its issues. Nothing was at issue except whether an ex parte petition gave rise to a case or controversy. In such an instance there was not a case or controversy before either the Commission or the Court of Appeals; there was merely an administrative hearing. The instant proceeding was a "case." It started not by petitioner WJKS asking the Federal Radio Commission just for a renewal of its

license; it started by the petitioner asking the Federal Radio Commission for additional facilities it was entitled to *under the law*. Section 5 of the Davis Amendment (Appendix, p. E), provides that the "licensing authority (the Radio Commission) shall carry into effect the equality of broadcasting service hereinbefore directed." Petitioner station WJKS (provided it showed itself qualified) being in an under-quota State, had a definite statutory right to have awarded to it facilities that the Commission was suffering to be used in other "over-quota" sections of the country. Under the orders promulgated by the Federal Radio Commission the applicant station was obliged to and did name the particular defendant station whose facilities it claimed the statutory right to have. It named stations WIBO and WPCC in Chicago. The petitioner, therefore, in this case was not an *ex parte* applicant to the Radio Commission for a renewal of something which the petitioner already had. It was an applicant for something that it did not have but which, under the Davis Amendment, Congress had indicated it could lay claim to secure. In addition to filing a petition (like a petition in equity) to show that it was entitled to additional facilities and qualified under the law to use them, it named as respondents in its petition two licensees in Chicago who were then using the coveted facilities. These Chicago licensees, WIBO and WPCC, were served. They filed an appearance; they subpoenaed witnesses, cross-examined all of the petitioner's witnesses. The hearing was governed by the rules of Equity in the District of Columbia. It was not an administrative determination of an *ex parte* application, like in the *General Electric Company* case; even before the Commission the hearing was a quasi-judicial determination, in all respects comparable to the determination before the Board of Tax Appeals, which in *Old Colony Trust Co. v. Commissioner of Internal Revenue*, 279 U. S. 716, this Court analyzed and held to be a proceeding judicial in character

and involving a "case or controversy" within the meaning of the Constitution. In the *Old Colony Trust Co.* opinion this Court, quoting Mr. Justice Field's definition in *In re Pacific Railway Commission*, 12 Sawy. 559, 32 Fed. 241, 255, concluded that a proceeding before the Board of Tax Appeals in all substantial respects met the tests in the definitions to qualify it as a case or controversy. We submit that the instant controversy between WJKS, petitioner, and WIBO and WPCC, respondents, when considered in the light of the Davis Amendment and General Orders Nos. 92 and 102 (Appendix, pp. F-I), meets the requirements of the various definitions of a "case" as applied in *Old Colony Trust Co. v. Commissioner.*

For instance, a part of Mr. Justice Field's definition is quoted (pp. 723-724) as follows:

> Whenever the claim of a party under the Constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.

This controversy fits the above definition like a glove. The petition of WJKS was certainly "the claim of a party under the laws (Davis Amendment and Order No. 92) of the United States." WJKS' pursuit of its "claim" unquestionably took "such a *form* that the judicial power is capable of acting upon it," in that, after the promulgation of the Commission's Order No. 102, WJKS' application for some new wave length and full time was amended to cite the particular wave length (560 kc.) then being used by WIBO and WPCC. Applicant's claim certainly, when this amendment was made naming particular defendant stations, became a "controversy", focused with definite issues and with rival litigants, WJKS, as "plaintiff", and WIBO and WPCC, as "defendants". Then, surely, if not before,

using the language of this Court, "it has become a case", because then, there were "adverse parties whose contentions are submitted to the court for adjudication".

In the *Old Colony Trust Co.* case the Court also quoted the words of Chief Justice Marshall when he construed Article III of the Constitution, in *Osborn v. Bank of United States,* 9 Wheat. 738 (p. 819) as follows:

> This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States *when any question respecting them shall assume such a form that the judicial power is capable of acting upon it.* That power is capable of acting only when the subject is submitted to it *by a party who asserts his rights in the form prescribed by law.* It then becomes a case and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States. (Italics supplied.)

WJKS, petitioning the Federal Radio Commission, the tribunal named in the law, was undoubtedly "a party who asserts his rights in the form prescribed by law."

In the *General Electric Company* case there was no "party who asserted any right in the form prescribed by law." There was only a party, the General Electric Company, which petitioned the Federal Radio Commission, and later the reviewing court, for a continuance of status,—as ex parte and discretionary a matter as it would be for a litigant to ask the court for an additional two weeks' time in which to file a brief.

The Federal Radio Commission, when first organized in 1927, faced a complex and difficult engineering and administrative problem, first, to comply with the terms of the statute in what was clearly an administrative responsibility, namely, to survey the facilities in use by the radio stations throughout the United States and evaluate them in order to bring about the equal distribution commanded by

the statute. The Davis Amendment in 1928 was addressed to the same purpose as the prior Act of 1927, but it made the Commission's powers more definite and authorized the Commission to promulgate rules and regulations to carry these powers into effect. At that time the various questions presented by applicants for radio licenses were admittedly not "in such a form that the judicial power could be capable of acting upon it." They were informal, following to a large extent the same informality that had become the practice with radio broadcasters when the whole question of radio licensing was handled administratively in the Department of Commerce.

The Commission proceeded to its engineering task first. Accordingly General Order No. 92 was promulgated, which classified and rated the value of radio facilities in use throughout the United States, and published the quota results, which, in effect said to every licensee in over-quota areas:

> Watch out! Your area is using more facilities than it has any right to under the law, and some of you will have to have something taken away from you, if applications are made from areas having less than the law gives them.

Order No. 92 was the engineering interpretation and application of the Davis Amendment. After its promulgation, all stations in over-quota areas were on notice that in the application of the terms of the law their use of assigned facilities might be challenged. And prospective applicants in under-quota areas learned that by the engineering application of the terms of the law they had a statutory right to more facilities than they were using. Still the procedure by which a station made application for increased facilities continued in some instances to be indefinite and unfocused, and might be said to fall short of being "in such a form that the judicial power could be capable of acting upon it". It was during that period that the *General Elec-*

tric Co. case arose, although it is doubtful if there ever were any issues in that proceeding that would make it possible of taking a judicial form, because that case did not present "adverse parties whose contentions are submitted to the court for adjudication."

To clarify procedure, and to raise specific issues between adverse parties, and to put the proceedings in such a form that the court could judicially review the controversy the Radio Commission promulgated General Order No. 102. Thereafter all applicants, claiming their statutory right of allocation of facilities, were compelled to name the licensee in an over-quota State or zone, whose facilities the applicant desired to capture. General Order No. 102, therefore, compelled proceedings before the Federal Radio Commission to be put in a form to enable the Commission to exercise what may be regarded as its quasi judicial powers. From the very start, there are adverse parties, plaintiffs in an under-quota region, and the defendants in an over-quota region, whose rival contentions to the time, power and wave length contested for are focused on definite issues. And findings of fact thereon if based on substantial evidence are, since 1930, made conclusive. The only parts of the Commission's decisions subject to review by the Court of Appeals are the rulings of law. While in the instant case it is true that the Commission is the only appellee named in the appeal, nevertheless, by reason of the intervention of Station WJKS, the Court of Appeals had before it for decision the same issues urged by the same adverse parties that were before the Commission.

This case is the very first case tried before the Federal Radio Commission which followed the procedure laid down in General Order No. 102.

It is submitted, therefore, even if the prior proceedings before the Commission and the court fell short of complying with the definitions of a "case or controversy", as

enunciated by Mr. Justice Field or Chief Justice Marshall, and set forth in other decisions of this Court[1], *this proceeding* complied in all respects with those definitions.

Even in *Muskrat v. United States*, 219 U. S. 346, a leading case where this Court inquired into what constituted the exercise of judicial power as conferred by the Constitution, there is the following significant comment, applicable and favorable here (p. 362):

> The questions involved in this proceeding as to the validity of the legislation *may* arise in *suits between individuals*, and when they do and are properly brought before this Court for consideration *they, of course, must be determined in the exercise of its judicial functions.* (Italics supplied.)

As pointed out above, this radio hearing, conducted in compliance with the Davis Amendment and regulations

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[1] The cases analyzed establish: (1) That it is not within the power of Congress to assign to courts of the United States (other than those of the District of Columbia) any duties except such as constitute a "case" or "controversy" within the meaning of the Constitution (*Hayburn's Case*, 2 Dall. 409; *United States v. Ferreira*, 13 How. 40); (2) that for a proceeding to constitute a case of controversy within the meaning of the Constitution there must be (a) adverse parties (*Muskrat v. United States*, 219 U. S. 346; *United States v. Ferreira*, 13 How. 40; *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70), (b) a proceeding effecting rights in themselves appropriate subjects of judicial cognizance or a wrong to be redressed or prevented (*Liberty Warehouse Co. v. Grannis*, 273 U. S. 70), (c) finality to the judgment of the court (*Gordon v. United States*, 2 Wall. 561; *Re Sanborn*, 148 U. S. 222; *Hayburn's Case*, 2 Dall. 409; *Alexander v. United States*, 201 U. S. 117; *Frasch v. Moore*, 211 U. S. 1; *Baldwin Co. v. Howard Co.*, 256 U. S. 35; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693), and (d) power in the court to enforce any judgment which may be given (*Muskrat v. United States*, 219 U. S. 346; *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70; *Gordon v. United States*, 2 Wall. 561; *Re Sanborn*, 148 U. S. 222; *United States v. Ferreira*, 13 How. 40); (3) that Congress has power to provide for the review of the action of administrative commissions or boards created by it which exercise only quasi-judicial powers on the theory that such review, although termed an appeal, actually is a proceeding *de novo* in the courts (*Stephens v. Cherokee Nation*, 174 U. S. 445; *United States v. Ritchie*, 17 How. 525); and (4) that the power of the courts can be invoked in aid of an administrative body in the performance of its statutory duty (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447), even though that aid involve a review of questions of fact as well as questions of law, unless the aid sought would bring the courts in such intimate connection with the legislative power that it would result in the revision by the courts of a legislative discretion confided to the administrative body (*Keller v. Potomac Electric Power Co.*, 261 U. S. 428).

See also *Road District v. St. Louis Southwestern Railway Co.*, 257 U. S. 547, 560; *Ex Parte Bakelite Corp.*, 279 U. S. 438; and *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716.

promulgated thereunder, is a "suit between individuals", and the interpretation of the Davis Amendment granting power enough to the Federal Radio Commission to weigh the equities between two rival stations, one in an over-quota and the other in an under-quota region, and take from the former to give to the latter, has been denied by the Court of Appeals. The majority opinion interprets this statute as lacking a sufficient grant of power to enable the Commission to equalize radio facilities by making an allocation in such a case. We have before the Court not only adverse parties but parties who assert conflicting rights, the proper determination of which depends upon the construction and validity of a statute. This certainly presents to the Court a case or controversy within the meaning of the Constitution.

Under Section 16 of the old or 1927 Act (Appendix, p. D) the Court of Appeals did not exercise a judicial review of the Commission's decision. The court was just a "super radio commission." Among the non-judicial features of the earlier act providing for what was called an appeal, we find:

1. The appeal could be taken to the Court of Appeals of the District of Columbia—or to
2. The *District* Court in the District where the station is located.
3. The appellant need file only the originals or certified copies of the "papers" and evidence presented with the original application or in the hearing.
4. The court hearing the appeal could allow the taking of additional evidence in any manner it prescribed.
5. The court on appeal could then alter or reverse the Commission's decree or it could enter such other judgments "as may seem just."

However, after the opinion of this court in the *General Electric* case, Congress passed the amendment to Section 16 known as the 1930 Act, (Appendix, pp. E-F) which changed the review of the Commission's decision from a purely administrative hearing on the part of the Court of

Appeals to a real judicial review. Changes in the 1930 Act, enabling the Court of Appeals of the District of Columbia to render a judicial review of the Commission's decision may be summarized as follows:

1. The Court of Appeals of the District of Columbia affirms or reverses the Commission,—instead of entering *any* judgment it deems best.
2. The court then remands the case to the Commission to carry out the judgment.
3. The appeal is based on a judicial record of all of the proceedings before the Radio Commission which record is made up like other records on appeal. The court may not take new evidence.
4. The court may not review the Commission's findings of fact except to determine whether they are supported by substantial evidence.
5. Its review is limited to questions of law except that it may examine the whole record to determine whether the action of the Commission was arbitrary or capricious.

The effect of the new law was to give the Court of Appeals a record in such form as to enable that court to make a judicial review, as against the loose *administrative* rehearing under the old law. It will therefore, be seen that we have all the elements of a "case or controversy" in the constitutional sense, and by the Amendment of 1930, we have also a judicial review of that case or controversy by the Court of Appeals—the two things which were lacking in the *General Electric* case. The fact that the Court of Appeals of the District of Columbia may be a legislative court, as respondents contend, is immaterial, since this court has held that it may nevertheless perform judicial functions.[1] It is submitted that this Court has jurisdiction under the judiciary clause of the Constitution.

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[1] Ex Parte Bakelite Corporation, 279 U. S. 438; Federal Trade Commission vs. Klesner, 280 U. S. 19; appellate jurisdiction has also been exercised in cases coming from Territorial Courts: Romeu vs. Todd, 206 U. S. 358; Good v. Martin, 95 U. S. 90; from the Court of Private Land Claims, U. S. vs. Coe, 155 U. S. 76, 85; and from the Court of Claims, DeGroot vs. U. S., 5 Wall. 419.

II.

The Court Below Not Only Misconstrued the Statute, but Its Conclusions Are Not Supported by the Record.

The majority opinion of the court below concludes that the decision of the Federal Radio Commission assigning to Station WJKS the frequency enjoyed by Stations WIBO and WPCC, and the consequent refusal to renew the licenses of the latter stations, is an arbitrary and capricious exercise of power.

This raises the three following inquiries:

1. Has Congress given to the Federal Radio Commission sufficient power to weigh the respective claims to public service of two stations, and, finding one less than the other, take the facilities from the one to give to the other?

We believe that Congress not only has granted sufficient power, but has imposed a direct mandate upon the Commission, to do that very thing.

It was because of the confusion in licensing and controlling broadcasting stations that the Federal Radio Commission was created.[1]

[1] For the convenience and information of the Court, there is here given a list of cases dealing with the constitutionality and construction of the Radio Act of 1927 and the Davis Amendment.

Cases construing the Act of 1927 and the rights of licencees thereunder: White v. Fed. Radio Com., 29 F. (2d) 113; United States v. Amer. Bond & Mortg. Co., 31 F. (2d) 448; Gen. Electric Co. v. Fed. Radio Com., 31 F. (2d) 630; Technical Radio Lab. v. Fed. Radio Com., 36 F. (2d) 111; City of N. Y. v. Fed. Radio Com., 36 F. (2d) 115; K F K B Broadcasting Assn. v. Fed. Radio Com., 47 F. (2d) 670; Journal Co. v. Fed. Radio Com., 48 F. (2d) 461; Trinity Methodist Church v. Fed. Radio Com., 62 F. (2d) 850.

Cases construing the Davis Amendment and General Orders Nos. 92 and 102: Chicago Fed. of Labor v. Fed. Radio Com., 41 F. (2d) 422; Ansley v. Fed. Radio Com., 46 F. (2d) 600; Reading Broadcasting Co. v. Fed. Radio Com., 48 F. (2d) 458; Durham L. Ins. Co. v. Fed. Radio Com., 55 F. (2d) 537; W H B Broadcasting Co. v. Fed. Radio Com., 56 F. (2d) 311; Strawbridge & Clothier v. Fed. Radio Com., 57 F. (2d) 434.

As pointed out in the dissent below (R. 1144):

> The debates in Congress prior to the adoption of the Act of 1927 indicate a recognition by Congress of the well known fact that, prior to the passage of the Act, chaotic conditions existed in the broadcasting field. There were within fifty miles of Chicago forty stations, of New York thirty-eight, of Philadelphia, thirty-two, and of San Francisco, twenty-two. It was this unequal distribution of the limited number of wave lengths, etc., and the recognition of the principle that equality of service within the several States depends in considerable measure in a proper distribution of operating stations within the States that induced the passage of the Davis Amendment.

The purpose of the Act of March 28, 1928 (Appendix, pp. D, E), known as the Davis Amendment, is shown by the preamble to Section 5 thereof, which amends Section 9 of the Radio Act of 1927 (Appendix, p. C), and declares that—

> * * * the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, * * *.

In order to secure such equality, the Act declares that the Commission shall as nearly as possible—"*make* and *maintain* an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to *each of said zones*" and "*shall make* a fair and equitable *allocation*" of such facilities "to *each of the States* within each zone, according to population." Instead of providing summarily for reallocation to be accomplished within a given date, the Davis Amendment directs the Commission to carry it into effect

whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for new licenses or for renewals. That all this is well within the regulatory power of Congress under the Commerce Clause there can be no doubt, and that one engaging in broadcasting obtains no property right to be free from the exercise of that power, is equally clear.[1]"

The court below seems to forget that the Congressional command to the Commission in making adjustments between the States, is not only to be "fair and equitable," but also *to make* the allocation. In using that word "allocate," Congress certainly means to arrange, distribute, move, adjust, assign. To shrink the meaning of the law, so as to inhibit the Commission from acting, when to allocate might injure a good station already established, would ignore the mandatory language "shall", and would curtail the powers of the Commission to such an extent that radio conditions would have to remain practically frozen in the position they were before the law was passed. So restricted, the Commission could only relieve an over-crowded area if a station were caught violating the Commission's rules, or if it voluntarily surrendered its license. Reason repudiates such a passive interpretation of powers conferred. The powers conferred are equal to the duties imposed. Since radio facilities are definitely limited, and all there were,

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[1] See discussion in *Trinity Methodist Church, South v. Federal Radio Commission* (D. C. App.) 62 F. (2d) 850, certiorari denied, 284 U. S. 685, and in *American Bond and Mortgage Co. v. United States* (C. C. A. 7th), 52 F. (2d) 318, certiorari denied, 285 U. S. 538. In the latter case it was said (p. 322):

> "If Congress under the Commerce Clause of the Constitution had the power to regulate this subject, it surely could exercise its power in the only manner which would accomplish the desired end, which was through the elimination of a plurality of broadcasting stations operating on the same wave length in the same territory at the same time. Every investment in broadcasting stations was subject to this exercise of reasonable and necessary regulation by Congress. As against such possible regulation there existed no vested right in favor of the investors."

were already assigned before the law was passed, Congress had to relieve the situation by providing for a sudden or a gradual reallotment. It chose the gradual method. But it is none the less clear that the purpose of Congress, in the Davis Amendment, was to lay the obligation upon the Commission to *weigh the equities*, and compare the service to the people which a station in one area might be rendering, with the service to the people a station in another area was rendering, and, in the interest of the public, take from one and give to another. It is the "people" in the zones and States whom the Commission must primarily keep in mind in making changes, *not* the licensees, or station owners. Where inequality of broadcasting service exists, the provisions of the statute become mandatory[1] and must be applied, irrespective of the detrimental effect such action may have upon any particular station. Of course this confers upon the Radio Commission a heavy responsibility. Not a greater responsibility, however, than Congress has heretofore bestowed upon other Commissions, such as the Interstate Commerce Commission.[2]

When a Commission with the delegated power to determine conflicting facts, has decided what "fairness to all

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[1] The court below seemed impressed with the off-hand comment of the Examiner to the effect that although the granting of the application would have a tendency to equalize the under quota condition of Indiana, nevertheless, Indiana now had service from the "State of Illinois, none of which service may be charged against the quota of the State of Indiana" (R. 1139 1141). Of course, it is true that the Midwest States have some service from New York and Eastern States. It is a rather well known fact that WLW in Cincinnati is heard all over the country but the law is plain that the division of the quota is to be by zones and states, and divided in the proportion of population as to the latter. And lest confusion arise in the computations where stations are close to state borders, the law itself declares that "allocations shall be charged to the state * * * wherein the studio of the station is located, and not where the transmitter is located." (Appendix p. E.)

[2] See state of *Colorado v. United States*, 271 U. S. 153, in which case this Court's observation exactly fits the instant discussion, viz (p. 169):

> "The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands."

(See also Mahler v. Ely, 264 U. S. 32, 41.)

concerned demands," then it is a well settled rule, as applicable here as in the case of other boards and commissions, that—

> * * * administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings. (Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 600 and cases therein cited).

The court below found no "irregularities." That the evidence is "legally sufficient" is discussed under question 3, *infra*.

2. Has the Commission, by its procedure, acted arbitrarily or capriciously in arriving at the decision in this case?

General Order No. 102 (Appendix, pp. H-1) set up the procedure to be followed where the Commission is called upon to decide between two contending stations. The procedure is fair to all. It gives the station operating in an over-quota State, whose facilities are demanded by a station in an under-quota State, the opportunity for defense and cross-examination. If it believes that it is operating more in the public interest than some other station located in the same state, which is licensed to employ facilities which the applicant could use, there is nothing to prevent it from so asserting and from having such other station, or stations if there are more than one, made parties. It also puts in the same record, side by side, the story of the service each station renders to its particular community. This gives the Commission a sound basis for factual comparison.

3. Do the facts of this record, fail to support the Commission's decision, so as to render that decision arbitrary and capricious?

In the majority opinion of the court below there is an almost total disregard of the *evidence* in the record which sustained the Commission's findings. The mere assertion of arbitrariness, is not enough to support so grave a charge.

Neither is it a sufficient basis to refer to the views of an employee of the Commission and express a *preference* for his conclusions.[1]

When the act of July 1, 1930, announced that "findings of fact by the Commission, if supported by substantial evidence shall be conclusive," it was the findings of the *Commission* that were meant, not those of an examiner, who is a subordinate employee, and whose recommendations, after a review by the Commission, may be, as in this instance they were, rejected. Yet the court below based its reversal of the case, not upon a review of the whole record, including the testimony and exhibits, but apparently upon only the Examiner's seven page "summary" of a 1000-page record.

The court below refers to the use of phonograph records by Station WJKS stating that although "it seeks greater opportunity to furnish broadcasting service to the people of Gary * * *, it even now devotes from two to three hours daily to broadcasting phonograph records." (R. 1141) The innuendo of that statement to the effect that appellant seeks more time for community broadcasts, but now uses its time for phonograph records, is a part of Respondents' brief below, but the *testimony* in the record does not justify it. The record shows that the two-hour period of phonograph records referred to is "from four o'clock in the morning until 6 o'clock" (R. 99), a time which most commercial stations, including Respondent stations (R. 478-522) do not use at all, which under the rules of the Radio Commission is not even included in the "broadcasting day" [2], and which is only used by Station WJKS because of the 24-hour day in the steel mills area (R. 65 and

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[1] The rule is stated in *Sweitzer v. Industrial Ins. Com. of Washington* (Sup. Ct., Wash.), 199 Pac. 724, 725, where the court said:

> "Action is not arbitrary or capricious when exercised honestly and upon due consideration, where there is room for two opinions, however much as it may be believed that an erroneous conclusion was reached."

[2] Rule 87 of Rules and Regulations of Federal Radio Commission (General Order 105, Sec. I) provides: The term "broadcast day" means that period of time between 6 A.M. and 12 midnight, local standard time.

95). Moreover, the testimony shows that WIBO, running a commercial, in contradistinction to a community station, devotes 2½ hours per day (R. 351) to the use of phonograph records, which is more time than WJKS gives to recordation (R. 351 compare 734-750). However, this form of broadcasting is perfectly proper if the records are well selected and used at appropriate times. The testimony shows that the records used by both stations are well selected, that there is a demand for them, and that they are used when other talent is not readily available, or in the case of WJKS when it is inappropriate to put on community programs. (R. 281-2.)

Since the opinion below points out no specific errors of law on the part of the Commission, it certainly should show from an analysis of the record that the Commission's findings are not supported by the testimony.

This was not done, and, we believe it could not be done, because each one of the findings of the Commission is conservative and restrained, and each is amply justified by an abundance of substantial evidence, most of which is not even controverted in the record.[1]

III.

Findings of the Commission Are Supported by Substantial Evidence.

For this Court's convenience, since the record is voluminous, each of the Commission's findings is set out below, with epitomized excerpts from the record to support it.

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[1] In the following cases the findings of the Federal Radio Commission were approved by the court: White v. Fed. Radio Com., 29 F. (2d) 113; Technical Radio Lab. v. Fed. Radio Com., 36 F. (2d) 111; City of New York v. Fed. Radio Com., 36 F. (2d) 115; Havens & Martin Inc. v. Fed. Radio Com., 45 F. (2d) 295; Ansley v. Fed. Radio Com., 46 F. (2d) 600; KFKB Broadcasting Assn. v. Fed. Radio Com., 47 F. (2d) 670; Reading Broadcasting Co. v. Fed. Radio Com., 48 F. (2d) 458; Durham Life Ins. Co. v. Fed. Radio Com., 55 F. (2d) 537; Pac. Dev. Radio Co. v. Fed. Radio Com., 55 F. (2d) 540; Strawbridge & Clothier v. Fed. Radio Com., 57 F. (2d) 434.

The Commission's Finding No. 1 (R. 1130):

The applicant station (WJKS) now renders an excellent public service in the Calumet region and the granting of this application would enable that station to further extend and enlarge upon that service.

Testimony supporting the above finding may be summarized as follows:

Gary is a community of homes, having a population of approximately 110,000 people, but the Calumet region, surrounding the steel mills, along the Lake, has a population of between 800,000 and 1,000,000 people, ninety per cent of whom depend upon the steel industry for a living; sixty per cent are foreigners. Sixty-odd nationalities are in the Calumet region. (R. 63.) WJKS is the only station in Gary. It fits its programs particularly to the needs of this foreign laboring population. The station is a community center (Morrow R. 264; Johnson R. 63, 64; Atlass R. 226).

(A.) *Foreign origin broadcasts.*

WJKS allots certain time weekly (at least one hour each day) for colored, Hungarian, Italian, Mexican, Spanish, German, Russian, Polish, Croatian, Lithuanian, Scotch and Irish talent. (Johnson R. 63, 64.)

Churches, civic clubs, such as Lions, Rotary, Kiwanis, and social workers' organizations, suggested many names to the station from whom a man was chosen as an outstanding American Citizen, who is also an outstanding representative of his particular foreign origin group, to lead each foreign origin broadcast. (Morrow R. 264, 265; Johnson R. 64.) Mr. Menczynski, Commissioner of Public Safety, and his wife, a former opera singer, are in charge of the Polish programs. (Morrow R. 265, 266.)

The Mexican broadcasts are in charge of Senor Rimas, a social worker in the city of Gary among the Mexican people. He picks out talented vocalists and musicians, and arranges the weekly Mexican program.

The German program is handled by a practising physician, who has organized musical clubs among the German people in the Calumet region and selects the most talented to broadcast.

The Hungarian group is known as the Vagabond Gypsies. They are all real Magyars, who play nothing but the unusual Hungarian instruments.

The Italian program is directed by Louis Vacirca, a civic leader among the Italians.

Irish and Scotch leaders present travelogue programs with music and stories from the countries discussed.

The Slavish people, Croatians, Czechs, Slavonians, and Lithuanians, appear on alternating half hours at Sunday afternoon broadcasts, giving without accompaniment choir singing and chants, in which they excel.

All of these foreign leaders are working people, well known in the Calumet region in their respective racial groups. They act as radio leaders of their nationals as a civic contribution. None are professionals (Morrow R. 264-7; Johnson R. 64).

The purpose of these programs is to entertain, to stimulate community and racial origin pride, to instruct in citizenship and American community ideals and responsibilities (Johnson R. 64). They are very much desired and appreciated in the Calumet region (Morrow R. 267). No money is made from such programs. They are a community contribution. (Johnson R. 79.) The station thus dedicates from eight to fourteen hours a week. (Morrow R. 269.) The need for more of this kind of community outlet is so great that the station has made this application for full time in order to allot more hours to this type of broadcast. (Johnson R. 90; Atlass R. 215-216; Morrow R. 269.)

(B.) *Special steel mill accident prevention talks.*

Special safety programs are given under the direction of the Division of Safety Inspection of the Illinois Steel

Company. This is presented for workmen, to explain the application of new safeguards to various types of machinery used in the steel mills. (Morrow R. 269; Johnson R. 73.)

(C.) *Saturday afternoon school children's amateur broadcasts.*

First aid and prevention of accidents to children are taught. The station maintains the William P. Gleason Children's Hour. Teachers from the public schools select the pupils to broadcast speeches, debates, songs or recitations. This broadcast is open and free to all public schools, parochial schools, and music schools throughout the Calumet district. Some Saturdays the station has 150 to 200 children. Demands to enlarge this broadcast are very great. (Morrow R. 269-271; Johnson R. 70-71.)

(D.) *Americanization programs.*

The station broadcasts good citizenship talks weekly by judges and civic leaders. (Johnson R. 79; Morrow R. 264.)

(E.) *Community activities are supported.*

Gary has no community chest, so WJKS gives free time to every fraternal, Christmas basket, Salvation Army and charity enterprise. WJKS collected sufficient money to furnish milk for the poor people of the community. Radio Chapel hour is held at noon every day, and the Elks Toast and chimes are presented every night. (Johnson R. 75.) Programs are presented by and for various communities of the Calumet area other than Gary. (R. 89.)

(F.) *Learn-to-speak English programs.*

An elementary course in the rudiments of English is given over the air. The same text book is used for beginners in Gary Public Schools. The teachers encourage chil-

dren to have parents utilize this radio instruction and report whether the parents try to speak English to the children at home. There is a great demand for more of this type of program. (Morrow R. 262-263; Johnson R. 69.) If the station secures full time, this program will be extended to three periods daily so that it will reach all the people on all three "shifts" at the mills. (R. 216.)

(G.) *Police cooperation.*

The Police Department uses the station frequently. Robbers have been apprehended and lost children found. In 1929 WJKS equipped 21 of the police cars of Gary with radios without expense to the Police Department. (Johnson R. 73-74.)

(H.) *WJKS needs full time to serve properly the Calumet district.*

The station has been operated for the benefit of the community. (Johnson R. 88, 89; Morrow R. 272.) Its purpose in applying for full time is to give "greater accommodation for our people". (Johnson R. 90.) WJKS is the *only* station licensed by the Federal Radio Commission, located in Indiana, with sufficient power to serve any substantial portion of the Calumet district with excellent or good service. (Ring R. 111, Falknor R. 165; Petr. Exhibit 2, R. 443.)

Chicago stations come into the Calumet region with chain or amusement programs, but none of them has any community features like WJKS. (Johnson R. 79.) *Because in Gary there is a full 24 hour working day, with three shifts, WJKS must have full time to be effective in reaching each of the three shifts with Americanization, educational and entertainment programs.* (Atlass R. 215.) WJKS has no chain programs. Its purpose is to develop further the policy of local community service to meet the conditions in that area. (R. 216.)

All of the above testimony stands in the record uncontroverted in any way.

The Commission's Finding No. 2 (R. 1130):

The deletion of stations WIBO and WPCC would not deprive the persons within the service areas of those stations of any type of programs not now received from other stations.

The above finding is supported by the following testimony:

The programs of WIBO are duplicated[1] by not less than 10 other Chicago stations whose service areas inclose that of WIBO, and seven other Chicago stations whose service areas partly overlap that of WIBO. (Ring R. 108-109.) In attempting to show a special public service, WIBO set forth in the record a large number of National Broadcasting programs. However, witness Russell, Vice-President of National Broadcasting Company, admitted that WGN, a clear channel, full time station in Chicago was available for National Broadcasting programs, and that if WIBO were removed from the Chicago territory there would still be six stations of like or greater power serving the same territory from which National Broadcasting Company could lease time. (R. 375.) The same programs given by the "Chicago American" over WIBO are also presented by stations WGN, WBBM, KYW, and WMAQ. (Rec. 206, 207.)

The religious broadcast by WPCC is wholly dependent upon Reverend O'Hair. The station is governed by nothing other than his desires and his personal religious con-

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[1] The following table shows the use (hours monthly) made of the broadcast facilities in the Chicago area and the effect of granting the application of WJKS (R. 183, 184).

	Before granting WJKS application	After granting WJKS application	Loss in Chicago area
Entertainment	3,599.44	3,239.4	360.04
Religious	418.18	343.1	75.08
Agricultural	272.8	272.8	none
Educational	557.1	557.1	none

victions. His is an independent church, not connected with any regular denomination. (O'Hair, R. 150-1.) He allows it to be used by no other denomination. He appeals for money over the air, the use of which he absolutely controls. It is not held in trust, and he is not under bond. (R. 150-153.)

WMBI, the Moody Bible Institute Station in Chicago, broadcasts exclusively religious programs, and WMAW gives 37 hours per month of religious broadcasting. (R. 154, 155.)

All of this testimony was furnished by the Commissioner's engineers or by respondents' witnesses.

The Commission's Finding No. 3 (R. 1130):

> **Objectionable interference is now experienced within the service area of WJKS through the operation of other stations on the same and adjacent frequencies.**

Testimony supporting the above finding is as follows:

There is a distinct interference from WFBL in Syracuse. WJKS now serves about two or three miles outside of Gary. Even that is not free from interference. Other stations have been heard to come in. (Johnson R. 68.) There have been many complaints from the public. (Johnson R. 68, 71, 72, 84.)

For a period of over a year, Johnson made inspection trips in the vicinity of Gary and listened on many receiving sets and he always noted bad interference, particularly to the south, southeast and east. (R. 68-69, 95.)

Falknor, expert radio engineer, had observed reception from WJKS in his home about 30 or 35 miles west from Gary for at least a year, and his experience was that the signal was too poor to give good service, not from the signal strength standpoint (volume), but due to heterodyne which was very objectionable. (R. 134, 159, 177-180.) Field

intensity tests made within a radius of approximately 30 miles of WJKS transmitter revealed objectionable interference. Doubling the power would not cure the trouble. (Falknor R. 179.) Tests showed that there was sufficient signal strength to give good reception if interference were not present. **(R. 159.)**

WIBO's engineering expert Craven, said, "I would expect objectionable interference due primarily to heterodyne." (R. 320.)

Witness Atlass testified that he has listened to Station WJKS on receiving sets in Gary at distances of 3 to 4 miles from the transmitter, and the reception of WJKS was interferred with by cross talk and heterodyne. On several occasions he heard the call letters of WFBL in the background. (R. 218.)

The 560 kc. frequency is heard in the Gary District without interference. (R. 95-155, 163-167-8, 357.)

The above facts of good reception in Gary from the 560 kc. frequency, and of cross talk and other interference actually experienced by WJKS on the 1360 kc. frequency *were not disputed by anybody.* But, to cast doubt upon the need of WJKS to change its 1360 kc. frequency to 560 kc., WIBO employed a radio engineering expert named Craven to testify. Commander Craven was qualified as an expert, but he was handicapped in breaking down the testimony relative to interference offered by Falknor, the engineering expert for WJKS, since he (Craven) had never seen any of the stations in question, and had made no actual tests, while Falknor had.

This expert testimony covers many pages of the record, but it may be concisely paraphrased and compared, thus:

Falknor	Craven
1. On March 5th I made an examination of the transmitter of WJKS. The equipment was in good mechanical condition and appeared to be in good electrical condition (R. 134).	Never saw station WJKS. The equipment might be improved. I don't know because I have not seen the equipment. (R. 314)
2. I have been observing WJKS for at least a year. On March 4th and 5th I made observations for the specific purpose of determining the extent of the heterodyne. It was extremely bad and was caused by another radio station (R. 134). On April 20th and 21st I made observations on the 30 mile circumference of a circle with WJKS as the center. There was annoying interference on all points (R. 159).	I have not observed WJKS. I would expect objectionable interference due primarily to heterodyne with WFBL (Syracuse) (R. 320).
3. I used a field strength measuring set of a special type (heretofore described) (R. 169, 170).	I do not know the equipment used by Mr. Falknor in taking the measurements of field strength. It may be accurate and it may not be. *I can give some presumptions but no facts* (R. 313, 314).
4. I made my determination of what I can actually hear on the receiver, which is, after	It all comes down to the ability of the human ear to discern the amount and the character of interfer-

all, the criterion (R. 171).

ence, and to judge the acceptability or objectionable features of it (R. 306). I consider it objectionable when there is cross-talk, heterodyne, a flutter present to a noticeable or marked degree, and interfering markedly with the program (R. 307).

If I can listen to the interference I can say whether or not it is objectionable to my ear, according to my personal taste, and whether the interference is due to cross-talk, heterodyne or flutter (R. 317).

Any person could determine whether there was interference and the character of that interference and whether it was loud or faint. All I am trying to say is that if you do have field strength measurements of some degree of accuracy you can evaluate and state with more precision the degree of interference (R. 322).

If the public makes objection it indicates a much greater volume of interference before they objected than in the case of an engineer (R. 324).

It is plain that *no actual* difference was developed between the expert witness Falknor for WJKS (who saw

the station and measured the interference), and the expert witness Craven for WIBO (who had no contact whatever with any of the stations). Only the most theoretical testimony was given by the latter in an effort to rebut the statements of the former, and the worthlessness of it was summed up by Mr. Craven himself in the words, "I can give some presumptions but no facts." (R. 314.)

Surely, the Commission is not arbitrary and capricious in basing its findings on the ear experience, and the results of actual tests, instead of the expert opinion hypothetical rebuttal!

The Commission's Finding No. 4 (R. 1130):

> **The granting of this application and deletion of stations WIBO and WPCC would not increase interference within the good service areas of any other stations.**

Testimony supporting the above finding is as follows:

Witness Higgy on behalf of WEAO, Columbus, Ohio, testified that should WJKS operate on 560 kc., WEAO would expect interference *only* in that area located between 120 and 140 miles from WEAO's transmitter, and that WEAO would still have a service area of 120 miles. (R. 61.) The good service area of a 750 watt station is limited to 25-35 miles. (R. 117, 135, 442.) This possible interference which WEAO suggested lies, therefore, far beyond that area in which good service from the Columbus station might be expected.

The Commission's engineer, Ring, testified (R. 117):

> "Moving the assignment (560 kc.) from the location of WIBO to that of WJKS would, by my record, be a move of approximately 30 miles southeast. The distance from Gary to Columbus station WEAO (operating on 570 kc.), is 250 miles. A change of 30 miles in 250 cannot of itself be said to be sufficient to def-

initely determine that interference would be increased."

This testimony stands undisputed in the record.

The Commission's Finding No. 5 (R. 1130):

> **The granting of this application and deletion of stations WIBO and WPCC would work a more equitable distribution of broadcasting facilities within the Fourth Zone, in that there would be an increase in the radio broadcasting facilities of Indiana which is now assigned less than its share of such facilities and a decrease in the radio broadcasting facilities of Illinois which is now assigned more than its share of such facilities.**

Testimony supporting the above finding is as follows:

Indiana is the most under-quota of any State in the Fourth Zone. It is 20 per cent under-quota. (R. 108.) Illinois is the most over-quota State in the Fourth Zone. (R. 386.) It is 49 per cent over-quota (R. 111, 386), and in units is the most over-quota State in the entire United States. (R. 1076-1078.)

There is no one single full time regional or clear channel station in the whole State of Indiana. (Ring R. 108.) The total power assigned to *all* stations in Indiana does not equal that of any one of five separate Chicago stations. (Ring R. 111.)

In other words, Illinois has more facilities above its rightful quota than all the facilities of every kind granted to the State of Indiana.

The Commission's engineers Ring and Greaves testified that the effect of granting this application would be to bring Indiana closer to the number of quota units due that State, and to reduce Illinois closer to the number of quota units due it; in other words, it would be an "allocation" in the direction of equalization. (R. 113, 382.)

None of this testimony is disputed.

The Commission's Finding No. 6 (R. 1130):

Public interest, convenience and/or necessity would be served by the granting, of this application.

The above finding is supported not only by *all* the evidence heretofore summarized, but by the following considerations as well:

The time for which WJKS is licensed on 1360 kc. is:

6 or 7 a. m. to 8:30 a. m
11 a. m. to 4 p. m.
7 a. m. to 8 p. m
10:30 p. m. to 12 p. m.

The above hours are too broken up to serve the public convenience as a regional station should, in a region like Gary, where in normal times the steel mills operate continuously throughout the entire 24 hours. (Johnson R. 65.)

Quoting from Johnson's testimony (R. 101):

> Q. What specific demand for programs have you had that you propose to put on at that period (8:30 to 12:30 a. m.)?
>
> A. We had demands from the workers who are relieved from the steel mills at 8 o'clock in the morning. They go home and have their supper when we are eating our breakfast; but there is no entertainment from that time on till 12:30 from our station, for them.

WJKS will establish a 24-hour service featuring the community and entertainment programs so desired by the Calumet area. Application has been made to install duplicate equipment for this purpose. (R. 215, 225, 230.) There are now requests for community broadcasting from other communities in the Calumet area sufficient to utilize the full time. (R. 90.)

The deletion of stations WIBO and WPCC would not deprive the persons within the service area of those stations of any type of program not now received from other

Chicago stations. (R. 108-9, 183-4, 203-4, 206-7, 350, 359, 360, 367, 376, and Exhibits 5 to 26, R. 447 to 661; see also Map Exhibit 1, R. 442, and compare with Maps Exhibits 2 and 3, R. 443, 444.)

The pressing need of WJKS in serving the Calumet area is relief from the interference which it experiences on 1360 kc. This need is plainly stated by witness Johnson in response to a question by the Examiner (R. 71):

> Q. You feel that your principal handicap is your lack of full time, your limited time?
>
> A. No. *Limited time is one of the barriers, but our reception is our greatest one.* With the amount of people in the community we serve, and the local proposition, we should have no interference within a radius of 40 or 50 miles; but we have interference within a radius of 6, 8 or 10 miles, especially on the evening program.

Frequent protests as to this interference were made to the Federal Radio Commission. (R. 63, 83, 84.) The power of the station was doubled in an effort to overcome it. (R. 63). The transmitter is in good mechanical and electrical condition. (R. 134). It is well located. (R. 83.)

If WJKS were allowed to operate on 560 kc. reception would be good, and the interference from which the Calumet district now suffers would be eliminated. (R. 95, 163.)

IV.

The Commission Did Not Act Arbitrarily in Disregarding the Alleged Cost of WIBO.

The court below attached great importance to the view of the Examiner that "the owners and operators of these stations (WIBO and WPCC) have at great cost prepared themselves to exercise their broadcasting privileges * * *" and states that station WIBO has a worth of from five to seven hundred thousand dollars. To refuse renewal of li-

cense in the face of the alleged value of the station will doubtless be emphasized before this court, as an arbitrary act of the Commission.

Since withdrawal of a radio license does not amount to an unconstitutional destruction of a property right (see *American Bond & Mortgage Co. vs. United States,* 52 F. (2d) 318; *Trinity Methodist Church South v. Federal Radio Com.*, 62 F. (2d) 850; and *White v. Federal Radio Com.*, 29 F. (2d) 113) it would seem that the Examiner and the court over emphasized its importance, even if the large sum of $340,000 were the actual cost of the station.

But the record does not support the views of the Examiner on the financial responsibility of Respondent stations.[1]

Since the court below places emphasis on the "total cost of about $346,362.99" alleged as the cost of WIBO which it is claimed will be forfeited by the Commission's ruling, let us examine as far as is possible from the information presented by WIBO what basis there is for this large figure. WIBO was first licensed in 1925. It was owned by Alvin E. Nelson and his brother, individually, who bought out the interests of Russo and Florito for $15,000.00. In 1925 Nelson brothers established Nelson Bros. Bond & Mortgage Co. In 1929 the Nelson Bros. Bond & Mortgage Company, of which Alvin E. Nelson is President and his

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[1] The record shows that:
WIBO is weak from a financial standpoint.
It is not primarily a radio company (R. 397).
It is a first mortgage real estate company (R. 397).
The losses in the bond and mortgage business can absorb all the profits in the radio station (R. 411).
If the real estate business failed, it would involve, if not destroy, the radio station (R. 413, 414).
Although it promised to do so, WIBO did not submit a thorough financial report with details; it only sent, after the hearing was closed, a balance sheet with no details (R. 433, 434, 1134).
The public accountants who prepared the balance sheet "flagged" it as being unsupported (see last sentence in the "certificate" of the balance sheet (R. 1135).
WPCC is also open to attack from a financial standpoint.
It solicits money over the air (R. 149, 153, 156).
No legal trustee has been appointed to handle the funds (R. 153).
Though the funds are solicited for religious and missionary purposes, the solicitation lacks the backing of any organized denomination or trust handling (R. 150).

brother, Vice President, increased their capitalization. The station was transferred by the Nelson brothers to the Nelson Bros. Bond & Mortgage Company. Mr. Nelson did not state the price at which he transferred the station to the Nelson Bros. Bond & Mortgage Company but did say that it included $97,000 franchise, development expense, *and losses* (R. 411). This transfer of WIBO to the Nelson Bros. Bond & Mortgage Company assisted in the sale of stock and bonds (R. 411).

Mr. Nelson could not break down the figures representing the $346,000, at which they carried the station on their balance sheet, explaining them only as "cost" (R. 419), and *promising a certified public accountant's statement breaking them down* (R. 430). But this was not provided. There was submitted a balance sheet as of May 31, 1931, which was certified by Thulin & Company, but with two important qualifications: First, the certification is only to the effect that the balance sheet has been prepared from the books of Nelson Bros. Bond & Mortgage Co., Chicago, Illinois, and is in agreement therewith as of May 31, 1931. This is a most unusual form of certification! In effect it merely states that the balance sheet is in accord with the books. But are the books correct? A purpose of audits is to determine whether the books of a company correctly reflect the transactions and net worth of the company. This was carefully avoided by Thulin & Company, who style themselves "Public Accountants" (R. 1135) not Certified Public Accountants. Second, the certificate is further qualified by the phrase "No appraisal of values having been made by us" (R. 1134). The purpose of a balance sheet is to determine the net worth of a company at a given date. Thulin & Company warns that the balance sheet does not serve that purpose! It is impossible to determine by an examination of the balance sheet the cost or value of any of the items used in connection with the radio station. Read in the light of the second qualification the inadequacy and danger of such a statement becomes apparent. For

example, the largest item of assets, namely "Real Estate and Equipment (depreciation deducted) $756,939.17", indicates such real estate is not being carried at cost, nor at "cost or market, whichever is lower," (which is proper accounting practice) but indicates very clearly that there was an "appreciation" or "write up" of the property. This would be disclosed by a proper detailed audit. The auditing concern's second qualification is a red flag of warning, demanding further inquiry.

The same criticism is equally applicable to the item "Inventory of securities, $302,667.52". Are those securities carried at cost or market, whichever is lower? What kind of securities are they?

The audit fails to disclose whether the mortgages encumbering the real estate are in good standing or whether they are in default. The balance sheet fails to disclose whether the notes and accounts receivable are past due or collectible. The balance sheet fails to disclose whether the notes and accounts receivable have been hypothecated or whether they are free. The item in the balance sheet, "Notes and Accounts Receivable—Net $122,763.06" indicates a strong possibility that the notes and accounts receivable of the company are in a larger sum which have been pledged, and the apparent equity is $122,763.06. Why the use of the word "net" otherwise? The balance sheet fails to disclose whether the inventory of securities is free or pledged. At all events, the agreement to furnish a "certified public accountant's statement of the financial condition of the licensee, Nelson Bros. Bond & Mortgage Company", certainly has not been met by the mere furnishing of a balance sheet so qualified. Appreciation of inventory or assets and the basis of such appreciation would not be disclosed by such carefully limited certification of the balance sheet.

From the documents submitted, it cannot be said that there is any evidence in the record of the financial condition of the Nelson Bros. Bond & Mortgage Co., nor can it

be said that there has been any justification for respondents' claim that the radio station WIBO represents an actual cost or investment of $346,000!

The Mortgage Company has its broadcasting station on a 20-acre plot of ground, but the use of twenty acres cannot remotely be charged to the operation of the radio station, nor can it be argued, even inferentially, that any act of the Radio Commission has destroyed the value of the land. On the contrary the Radio Commission may well have considered the financially mixed conditions of this station with the bond and mortgage business as weighing against its claims to public service.

In *KFKB Broadcasting Ass'n., Inc. v. Federal Radio Commission,* 47 Fed. (2d) 670, where the station was run in connection with a hospital and pharmaceutical business, the court observed (p. 672):

> "When Congress provided that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character."

The tests laid down in paragraph (d) of the 1930 Act (Appendix, p. F) to measure the correctness of the Commission's findings are that—

(a) the reviewing court must base its action on appeal "*upon the record*" and
(b) the findings of fact are conclusive if supported by substantial evidence—*unless* it shall clearly appear that the findings of the Commission are arbitrary or capricious.

From an analysis of the record no doubt can remain that the Commission's findings *are* supported by substantial evidence. So they must be conclusive, *unless* it *clearly ap-*

pears that they are arbitrary or capricious. We take it that from the way the statute is worded, even if the Commission had acted upon substantial evidence, still, if it acted arbitrarily, the Court might reverse its findings. But to do so the arbitrariness must "clearly appear". In what does it clearly appear in this case? The court below does not say. The record does not reveal it. And *what* would have to "clearly appear" to reveal an arbitrary or capricious action?

Now, "arbitrary" is defined in Webster's New International Dictionary as:

Depending on will or discretion; not governed by any fixed rules or standard; discretionary; despotic, absolute in power; bound by no law; tyrannical. Syn. absolute, capricious, irresponsible.

"Capricious" is defined by the same authority as: Characterized by lively exercise of fancy, wit, or invention; fanciful; fantastic; humorous, as governed or characterized by caprice, apt to change suddenly; freakish; whimsical; humorsome; changeable; of things changeable; irregular; changing apparently without regard to any laws. Syn: freakish, whimsical, fickle, crotchety, fitful, wayward, changeable, unsteady, inconstant, arbitrary.

Turning to the law books, we find that the term is not to be found in Bouvier's Law Directory. But it has been defined in a few cases.

In *Boyle v. Rock Island Coal Mining Co.*, 125 Okla. 137, 256 Pac. 883, the court said:

> "Arbitrariness consists in conduct or acts based alone upon one's will, and not upon any course of reasoning and exercise of judgment. If the matter, thing, or practice calling for the exercise of authority is one involving a controversy about which reasonable and experienced men differ, the authority exercised on either side of the controversy could not be said to be arbitrary."

Again, in *Sweitzer v. Industrial Ins. Commission,* 116 Wash. 398, 199 Pac. 724, the test is given as follows:

> "For action of the Industrial Insurance Commission, as to compensation for injury to an employe, to be 'arbitrary or capricious' relative to right of review, it must be willful and unreasoning, without consideration, and in disregard of the facts and circumstances of the case; and when exercised honestly and on due consideration, and there is room for two opinions, it is not enough that it may be believed that an erroneous conclusion was reached."

In *United States v. Lotempio* (D. C. N. Y.), 58 F. (2) 358, 360, we find:

> "Arbitrarily" is defined as meaning "without fair, solid, and substantial cause"; that is, without cause based upon the law.

And in *King v. Falls County,* 42 S. W. (2d) (Texas) 481, 482, the court says:

> "Arbitrarily" means in an arbitrary manner, and "arbitrary" means: Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic.

By process of elimination we must conclude that the court below did not decide that the Commission's action was arbitrary because it was "without regard to any law," because the court pointed out no error of law. It appears, too, that the findings of the Commission are "not manifestly against the evidence." (*KFKB Broadcasting Ass'n., Inc. v. Federal Radio Commission,* 47 F. (2d) 670). So, all that remains as a cause for the capricious and arbitrary charge is that the Commission acted "tyranically," despotically," or evidenced personal hatred or bias.

None of these can possibly be found, much less be said to "clearly appear" from the record, particularly in view of the fact that two of the five appellate Judges fully agreed with the Commission's conclusions on the facts submitted.

The conclusion seems to follow that the court below has, in reviewing this case, unfortunately slipped back into its practices under the old act, wherein the power confided to the Commission respecting the granting or refusing of radio licenses was held to be purely administrative and the provisions for appeal to the Court of Appeals did no more than make that court a superior and revising agency in the same field, allowing it to substitute its findings for those of the Commission.

Since the amendment of the Radio Act in 1930, the court must review the case on the record judicially, not administratively. It cannot substitute its findings for those of the Commission.

V.

Cases Relied Upon by Court Below Are Not Controlling Here.

As one of the grounds for its decision, the court below held that it would not be consistent with the legislative policy to equalize the broadcasting facilities of the various states or zones by unnecessarily injuring stations already established which are rendering valuable service. In support of this holding the court cited its prior decisions in *Reading Broadcasting Co. v. Fed. Radio Com.*, 48 F. (2d) 458; *Chicago Fed. of Labor v. Fed. Radio Comm.*, 41 F. (2d) 422; *Strawbridge & Clothier v. Fed. Radio Comm.*, 57 F. (2d) 434.

We submit that these cases are readily distinguishable from the instant cases.

In *Reading Broadcasting Co. v. Fed. Radio Comm.*, the applicant, a station at Reading, Pennsylvania, and admittedly rendering good local service, applied for a permit to install a new transmitter, to increase its frequency and

for unlimited time *which would have changed it from a local to a regional station.* While this station was located in an under-quota state, the Commission found that its service could be improved by equipment adjustments and that the granting of the application would injuriously affect other stations, resulting in a loss rather than a gain of service to that and other localities. It would have meant a further disturbance of an already congested condition in the broadcasting field without a corresponding benefit to the public. The court approved the finding of the Commission and held that, under the foregoing circumstances, the Davis Amendment would not demand the granting of an application which would result in a loss to the broadcasting service, for under such circumstances the public interest would not require it. The case is without application to the facts in the instant cases.

In *Chicago Fed. of Labor v. Fed. Radio Comm., supra,* a station near Chicago, Illinois, applied for an increase of its broadcasting facilities, which would have advanced it from a regional to a clear-channel station. The Davis Amendment was not directly involved, but the opinion shows that the court recognized the over-quota conditions prevailing in the Chicago Area *in which the applicant station was located,* the court holding that in view of the fact that the Fourth Zone already enjoyed more than its proportionate share of clear channels, the result would be no improvement for the listening public. The court left the three stations in the possession of the privileges they theretofore enjoyed, a course which had been adopted by the Commission. The case cannot be regarded as authority for the decision in the instant cases.

In *Strawbridge & Clothier v. Fed. Radio Comm., supra,* a Philadelphia station made application for an increase in its power. The Commission found that the City of Philadelphia and surrounding area was already receiving a good

broadcasting service, that the granting of the application would result in objectionable interference with other stations and that the public interest, convenience and necessity would not be served thereby. The applicant insisted that since it was located in an under-quota State in an under-quota zone it was the duty of the Commission, under the Davis Amendment, to require other stations to reduce their power so as to avoid interference. The court, in affirming the order of the Commission, held that the applicant had entirely failed to carry the burden of proof that the reduction of power of the other stations would be for the public interest, convenience and necessity.

This case, we contend, makes for rather than against our position. The court affirmed the validity of General Order No. 102 and recognized that, in a proper case, an applicant from an under-quota State in an under-quota zone may apply for facilities in use in an over-quota State in that zone. The opinion holds that this Order places upon the applicant the burden of proving that it would be for the public interest, convenience or necessity, to reduce the power of one station for the benefit of another, and that "many elements must be considered in the determination of that question."

Petitioner submits that it has met this burden in these cases and has presented elements which warranted the granting of its application.

VI.

The Court Erred in Failing to Follow Applicable Principles Announced in Its Prior Decisions.

Not only did the court rely upon cases not controlling here, but it failed to apply to the facts in the instant cases the principles established by its prior decisions in the construction and application of the Davis Amendment and General Orders 92 and 102.

In *Durham Life Insurance Co. v. Federal Radio Commission*, 55 F. (2d) 537, a broadcasting station in Raleigh, North Carolina, applied for an increase in power and for the installation of new equipment. While it appeared that the station was meritorious, that the additional facilities would permit more extended and reliable service and would not result in serious interference with existing stations, the Commission found that the granting of the application would work a violation of the Davis Amendment, in that there would result an increase in the radio broadcasting facilities of a zone which then enjoyed more than its share of such facilities, and that, although the State of North Carolina then had less than its share of radio broadcasting facilities, if the application were granted a violation of the Act would result, in that the State would thereby be assigned more than its share of such facilities. The Court quoted from the Commission's finding as follows (p. 539):

> "Section 9 of the act as amended, is the basis for the quota system and its provisions are mandatory upon the commission to 'make and maintain an equal allocation' of broadcasting facilities. The section indirectly prohibits grants of facilities, the effect of which would be unequal allocation. In effect the Commission declared in General Order 92 that in the present state of the radio art the country had reached its approximate saturation point, possessing the maximum available broadcasting facilities, and that the problem was the distribution of such facilities as required by the standard of public interest and section 9 of the act, as amended.
>
> It is conceivable that remote instances may occur where the denial of the use of a facility, for reasons based upon the quota figures, may apparently seem arbitrary. In many of such instances, however, the particular facility may be used in another locality where it would tend toward an equitable distribution as required by the act. And in the great majority of cases the ultimate result is to make possible a better radio service by equality in distribution of facilities. In

any event the Congress has issued its mandate and these and similar orders of the Commission are merely for the purpose of carrying that rule into effect."

In affirming the Commission's order in denying the application, the court said (p. 540):

> "It is true that the increase of power requested by appellant would subserve the public convenience and interest of the people residing in the additional area which would be better served thereby. But the Commission must take into consideration the public convenience, interest, and necessity of the radio service of the entire country, of which appellant's station and its service area are but a part. Congress has found it necessary to formulate general rules to govern the exercise of this authority. Accordingly, in the Davis Amendment it has provided that as far as possible an absolute equality of broadcasting facilities is to be divided between the respective zones, and that each zone's facilities shall be divided among the states composing it according to population. The Commission is required to carry this equality into effect whenever necessary or proper, by increasing or decreasing station power when applications are made for licenses or renewals of licenses. This provision plainly includes the authority similarly to deny an increase of power when applied for by a station. General Orders 92 and 102 are valid regulations within the terms of the Davis Amendment, and the Commission's denial of appellant's application is justified thereby."

The Court affirmed the constitutionality of the Davis Amendment and the regulations made thereunder and, concluded as follows (p. 540):

> "The decision of the Commission is not arbitrary or capricious. The number of radio stations already operating in this country is so great that a faithful compliance with the restrictive regulations relating to the establishment of new stations, or the increase of the power of existing ones, is necessary to avoid confusion.

At times this may seem harsh in individual cases, but it is conducive to public interest, convenience, and necessity, when the broadcasting system of the country is considered as an entirety." (Italics supplied.)

In *WHB Broadcasting Co. v. Federal Radio Commission,* 56 F. (2d) 311, essentially the same questions were involved. A station likewise applied for additional time and the Commission found that, while the station was rendering a good service, it did not appear that the assignment of additional power would enable it to render better service; that the area in which the station was located was then receiving good broadcasting service, and that the granting of the application would result in an increase of broadcasting facilities in a State and zone then enjoying more than their share of such facilities. The order of the Commission was affirmed on the authority of *Durham Life Ins. Co. case. supra,* the court saying (p. 312):

> "Under the so-called Davis Amendment (45 Stat. 373) the Commission must consider the public interest, convenience, or necessity of the radio service of the entire country. That amendment requires the Commission, so far as possible, to establish and maintain an equality of radio broadcasting service among the different zones and among the states within those zones, according to population. (Durham Life Insurance Company v. Federal Radio Commission.) It is apparent, therefore, that, as found by the Commission, the granting of appellant's application would work a violation of the so-called Davis Amendment. * * *"

(See also *Strawbridge & Clothier v. Federal Radio Commission, supra; Pacific Development Radio Co. v. Fed. Radio Com.,* 55 F. (2d) 540.)

While these cases involve a negative, as distinguished from an affirmative, application of the equalization provisions of the Davis Amendment, there is no distinction in principle. They affirm the constitutionality of the Davis Amendment and the validity of General Orders 92 and 102

as reasonable regulations thereunder to enable the Commission to carry out the requirements of the Act that it shall establish and maintain, in so far as possible, both an absolute equality of radio broadcasting among the different zones and an allocation of stations within the states of those zones according to population.

It is under the principles announced in these cases that the petitioner contends the order of the Commission granting its application should have been affirmed.

CONCLUSION.

It is respectfully submitted that the record in these cases amply supports the unanimous findings of the Federal Radio Commission, and that the decision of the court below rests upon an erroneous interpretation of the Davis Amendment—an interpretation inconsistent with its prior decisions, and should, therefore, be reversed.

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March, 1933.

APPENDIX.

The Radio Act of 1927, c. 169, 44 Stat. 1162, provides, in part, as follows:

> That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

SEC. 2. For the purposes of this Act, the United States is divided into five zones, as follows: * * *; the fourth zone shall embrace the States of Indiana, Illinois, * * *.

SEC. 3. That a commission is hereby created and established to be known as the Federal Radio Commission * * *.

SEC. 4. Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the provisions of this Act will be more fully complied with;

(g) Have authority to establish areas or zones to be served by any station;

(h) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(i) Have authority to make general rules and regulations requiring stations to keep such records of pro-

grams, transmissions of energy, communications, or signals as it may deem desirable;

* * * * * * * * *

SEC. 9. The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.

* * * * * * * * *

SEC. 11. If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject;

(a) The station license shall not vest in the licenses any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

* * * * * * * * *

SEC. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or refuse the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal.

The Act of March 28, 1928, c. 263, 45 Stat. 373, provides, in part:

SEC. 5. The second paragraph of section 9 of the Radio Act of 1927 is amended to read as follows:

"It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall be nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses; *Provided*, That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located."

The Act of July 1, 1930, c. 788, 46 Stat. 844, amending Section 16 of the Radio Act of 1927, declares, in part:

SEC. 16 (a) An appeal may be taken, in the manner hereinafter provided, from decisions of the commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the commission.

(2) By any licensee whose license is revoked, modified, or suspended by the commission.

(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying or suspending an existing station license.

* * * * * * * * *

(d) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of Title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal.

U. S. C. Sup. VI, Title 47, Sec. 96 (a) (1), (d).

General Order No. 92, adopted June 17, 1930, provides, in part, as follows:

Whereas, the Act of Congress approved March 28, 1928, entitled "An Act continuing for One Year the Powers and Authority of the Federal Radio Commission under the Radio Act of 1927, and for other Pur-

poses," provides and declares that "The people of all the zones established by section 2 of this Act (Radio Act of 1927) are entitled to equality of radio broadcasting service, both of transmission and of reception," and

Whereas, said Act approved March 28, 1928, above referred to, also provides and requires that "in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power," and

Whereas, It was the intent and purpose of Congress to secure an equal distribution of radio broadcasting service, both of transmission and of reception between the five zones aforesaid, and

Whereas, it is necessary, in order to make and maintain such equal allocation between said five zones and fairly and equitably between the states within each of the zones, that the Commission determine the value of stations of various classes or of various powers in effecting such allocation, and

Whereas, the Commission has sought and obtained the best advice and information available and has given much time to an intensive study to such values of stations of various powers, and

Whereas, the Commission, through its engineers and from studies made by the Commission has considered all the elements required by Congress to be considered, and has allowed the paramount intent and purpose of the Act of March 28, 1928, above referred to, to control, *i. e.*, "that the people of all the zones * * * are entitled to equality of radio broadcasting service, both of transmission and of reception," and

Whereas, it has been found that, according to the broadcasting service rendered to the people of each zone and of the states within each zone by stations of various classes, both of transmission and of reception, each class of station is of the following value in units, to-wit:

(The classes of stations and the value in units given to each are here omitted. They appear at pages 1070-1072 of the Record.)

For stations dividing time on the same frequency the value assigned will be in proportion to the time assigned.

It is therefore

Ordered that the values of radio broadcasting stations of the various classes, powers and time of operation be and they are hereby fixed in units as above set forth, and

It is further ordered that each of the five zones created by Section 2 of the Radio Act of 1927 shall each have broadcasting stations the total value in units of which shall be equal, and shall be fairly and equitably distributed among and allocated to the states within each of said zones in proportion to the population each of said states bears to the population of the zone, and that the quota of broadcasting facilities to which each state is entitled shall be determined and fixed as herein provided and in accordance with values in units for various classes of stations above set out.

General Order No. 102, effective January 8, 1931, provides:

Whereas, under the unit and quota figures adopted by the Commission, the First and Second Zones are under-quota and the remaining three zones are over-quota;

And whereas, there are a number of states that are over-quota and a number of states that are under-quota;

And whereas, there is now pending before the Commission a number of applications from under-quota states which, under the law, are entitled to their pro rata share of radio facilities;

Therefore, in order to bring about an equalization of these radio facilities among the states in the zones, the Commission adopts the following with reference to applications:

1. Where a zone has already in use its pro rata share of facilities, the Commission will not allocate any further radio facilities to that zone, which would increase its quota.

2. Applications from under-quota states in zones which have already allocated to them their pro rata share of radio facilities should be for a facility already in use in that zone by an over-quota state.

3. Likewise, where a state is already over-quota, the Commission will not allocate any further radio facilities to that state, which would increase its quota.

4. Applications from states which now have their quotas, or from states which are over quota, should be for facilities already in use in that state.

5. An applicant from an under-quota state in an under-quota zone may apply either for facilities in use in an over-quota state in that zone or an over-quota state is an over-quota zone.

The further questions of kilocycle and mileage separations should also be considered by an applicant in selecting the frequency to be applied for.

Since the Commission has classified stations in accordance with power into three classes, namely, clear channel, regional, and local stations, and has allocated certain frequencies for the use of each of these three classes of stations, applications should be for frequencies set aside by the Commission for the character of station applied for.

All applications now pending before the Commission which have not been heard or designated for hearing by the Commission may be amended by the applicants to conform to this Order.